

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KRISTIE FARNHAM, individually and on
behalf of all those similarly situated,

Plaintiff,

-vs-

Case No. 16-CV-295-WMC

CARIBOU COFFEE COMPANY, INC.,

Madison, Wisconsin

November 27, 2017

Defendant.

10:05 a.m.

STENOGRAPHIC TRANSCRIPT OF SETTLEMENT APPROVAL HEARING
HELD BEFORE U.S. DISTRICT JUDGE WILLIAM M. CONLEY

APPEARANCES:

For the Plaintiff:

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For the Defendant:

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APPEARANCES CONTINUED:

For the Objector, Susan Stradtman:

Miller & Ogorchock, S.C.
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7 (Proceedings called to order at 10:05 a.m.)

8 THE CLERK: Case No. 16-CV-295-WMC, *Kristie Farnham v.*
9 *Caribou Coffee Company*. Court is called for a settlement
10 approval hearing. May we have the appearances, please.

11 MR. HEDIN: Good morning, Your Honor. Frank Hedin,
12 Carey Rodriguez Milian Gonya, on behalf of the class.

13 MR. MILIAN: And David Milian on behalf of the class as
14 well. Good morning, Your Honor.

15 MS. HOFFMAN: Good morning, Your Honor. Erin Hoffman
16 on behalf of defendant, Caribou Coffee.

17 MR. OGORCHOCK: Good morning, Your Honor. Attorney Tom
18 Ogorchock on behalf of the objector, Susan Stradtman.

19 THE COURT: I've never had anyone sit off to the side
20 whose made an appearance, so I would suggest you sit at counsel
21 table. Right there at the end would be fine and just move the
22 mic towards you.

23 MR. OGORCHOCK: No problem.

24 THE COURT: Thank you for your appearances, and good
25 morning, all. We are here for a fairness hearing on a proposed

1 final settlement agreement. I will address that motion for
2 final settlement agreement in a moment, but because we have
3 this -- what has become a satellite dispute over the appearance
4 of the Bandas Law Firm and its proposed representation of Susan
5 Stradtmann, I will take that matter up first.

6 Let me say at the outset that the Court found all of the
7 time and energy spent on this to be much ado about nothing. In
8 fact, to the extent there seems to be a dispute between the
9 objector and the class members, it is wholly unimpressive. What
10 is impressive and a waste of the Court's time is the amount of
11 effort put in by counsel for the class and by counsel for
12 Ms. Stradtmann on matters which seem to spend almost -- most if
13 not all of their efforts on conduct involving other cases not
14 before this Court and not something that I intend to take up.

15 I will note that I've received yet two more written
16 submissions over the last few days from objector Susan
17 Stradtmann, *Motion to Strike Plaintiff's Reply in Support of the*
18 *Motion to Prohibit Unauthorized Communication With Unnamed Class*
19 *Members and to Disqualify the Bandas Law Firm* or, alternatively,
20 *a Motion for Leave to File a Surreply*. Although I found the
21 surreply as equally unhelpful as the original response, I will
22 grant the latter motion for leave to file surreply and deny the
23 motion to strike, and so those motions are addressed. I have
24 considered those submissions.

25 Let me then turn to the *Motion to Prohibit Unauthorized*

1 *Communication.* The argument by counsel for the class is that
2 the Bandas website is "remarkably deceptive and misleading in
3 both appearance and substance." I just simply disagree. There
4 isn't anything particularly misleading about it. I understand
5 that class counsel would prefer that they not have attempted to
6 obtain -- that is to say that the Bandas Law Firm not have
7 attempted to obtain objectors to the proposed settlement, but
8 there wasn't barratry here. The website wasn't particularly
9 misleading. It pretty much stated what their role would be.
10 It, as has been pointed out, provided links to the actual class
11 representative -- I should say to the class's law firm or class
12 counsel which provided all the details. They never suggested
13 they were representing the class. In fact, the very notices
14 that they emphasized were to object to the class settlement.

15 As for the Rules of Professional Conduct, I didn't see
16 anything in this case that suggests those statements about the
17 Bandas Law Firm or Mr. Bandas were false. If you want to take
18 that up with the appropriate professional responsibility
19 authority, do it on your own time.

20 As for -- that addresses the disqualification. I thought
21 both sides were less than straightforward in the deposition of
22 the objector, Ms. Stradtmann, and I am amazed that after all of
23 the efforts that were put into this back-and-forth, including a
24 deposition of Ms. Stradtmann, that so little is really presented
25 in terms of a basis to disqualify. I will deny the motion to

1 disqualify.

2 At the same time I found very little helpful provided by
3 the Bandas Law Firm, beginning with the objection that was filed
4 by Ms. Stradtmann. There is now before me a motion by
5 Ms. Stradtmann for leave to file an opposition to the class
6 motion for final approval for class action. You have offered me
7 nothing -- Mr. Ogorchock, you have offered me nothing that would
8 suggest you have anything more to add than the objection itself.
9 You had all this time to file all of these responses to motion
10 to strike, and if you had anything more you wanted to add with
11 respect to the objections that your client had already raised,
12 you should have done so before this.

13 You know, the settlement itself, as your website
14 demonstrates, has been -- was preliminarily approved on July 28,
15 2017. You had more than ample time to raise any legitimate
16 objections, and the only examples you give in your motion for
17 leave to file formal opposition to the final request for
18 approval, which substantively doesn't change in any material
19 respect from that which the Court approved months ago, is that
20 you claim there's a misleading portrayal of authority in the
21 Seventh Circuit. This Court is well aware of what the Seventh
22 Circuit authority is. You're unlikely -- you certainly haven't
23 provided me with anything enlightening so far, so I'm not going
24 to hold up this hearing because of the possibility that you have
25 some unique insight about Seventh Circuit case law, although

1 you're welcome to raise it today if you really think that's the
2 case.

3 As for the claim that class counsel has falsely represented
4 a 30 percent benchmark for attorney's fees in the Seventh
5 Circuit, that is straightforward as well, and I didn't need your
6 assistance to provide this Court with an understanding of its
7 responsibilities to review the merits of the proposed attorney's
8 fees and to decide what those are. So nothing you provided me
9 so far would suggest there's any reason to delay this hearing,
10 and I deny your motion for leave to file an opposition, although
11 I will take up your objections.

12 I believe that addresses all of the preliminary motions
13 that were proposed by both counsel for the class and for the
14 objector, Ms. Stradtmann, and so I will move on to the reason
15 why we are here, which is the final fairness hearing. This case
16 involves a lawsuit filed by Kristie Farnham on behalf of herself
17 and those similarly situated on May 5, 2016, alleging that
18 Caribou Coffee, the defendant, had violated the Telephone
19 Consumer Protection Act, the TCPA, by sending advertisements via
20 SMS text messaging en masse to cell phones of class members
21 through use of an automatic telephone dialing system, an ATDS
22 system, without express written consent.

23 As I've mentioned, the Court granted preliminary approval
24 of the proposed class action settlement on July 28, 2017, and
25 that settlement is essentially the same as before the Court

1 today with the exception that there was a higher response rate
2 than expected, so the individual recovery will be reduced from
3 approximately an estimated \$200 to about \$70, and the
4 administrative costs apparently have now doubled as represented
5 by Epiq, who was the claims administrator, Epiq Class Action and
6 Claims Solution, Inc. The number of respondents has resulted in
7 a substantial increase in the costs in dealing with class
8 members, and that resulted in, according to them by affidavit
9 submitted to the Court, in a doubling of the overall costs of
10 administration. Other than those distinctions, I don't see any
11 substantial difference from that proposed class action that the
12 Court approved in July.

13 As for the motion for final approval then, it is the
14 Court's responsibility to evaluate the fairness of the
15 settlement considering the strengths of plaintiff's class --
16 plaintiff's case compared to the amount of defendant's
17 settlement offer and assessment of the likely complexity,
18 length, and expense of the litigation and evaluation of the
19 amount of opposition to settlement among affected parties, the
20 opinion of competent counsel, and the stage of proceedings as
21 well as the amount of discovery completed at the time of
22 settlement.

23 The notice indicates that plaintiff's counsel represented
24 the court-approved notice procedures and contacted hundreds of
25 thousands of members of the settlement class by both mail and

1 email as well as by executing an extensive online publication
2 notice campaign. According to counsel, this means that 99
3 percent of the people associated with the telephone numbers
4 received individual notice. Additionally, notice was
5 electronically published in banner advertisements on *Yahoo Ad*
6 *Network* delivering over 10 million impressions on both a
7 national and geo-targeted basis.

8 I certainly find that notice was adequate, and that is
9 reflected by a total of some 73,703 members, 13.9 percent of the
10 total number of potential claimants, and as indicated, it
11 appears that those class members who did respond and opt in are
12 likely to receive approximately \$75 from the -- actually I
13 suppose it will be a little less than that now that we've got
14 the double in projected costs, but it will still be a sum -- do
15 you have an approximate total now with that sum?

16 MR. HEDIN: Yes, Your Honor. Once the updated claims
17 costs are deducted from the fund and the requested attorney's
18 fees, assuming that request is granted, the per claimant
19 recovery will be \$70.80.

20 THE COURT: All right. I am going to adjust the class
21 counsel's request, but I find the \$70 to be reasonable
22 compensation under all the circumstances here, and I'll explain
23 why briefly, from the plaintiff's perspective, the \$8.5 million
24 offered by Caribou Coffee is substantial -- I should say by
25 plaintiff's counsel's perspective and obviously by the class

1 representative's perspective. And in particular they note the
2 legal uncertainties associated with continued litigation that
3 pose substantial risk of nonrecovery to the settlement class.
4 I'm not sure that nonrecovery is likely, although I do agree
5 that the D.C. Circuit's decision in *ACA International* could
6 result in some change in the definition of automatic telephone
7 dialing system and, given ongoing changes in the United States
8 Supreme Court, perhaps even review by that Court.

9 But the case law is fairly substantial and long standing,
10 so while I think there's some risk, I don't overestimate that
11 risk, but I do think that there are individual issues that
12 arguably could have affected the recovery of the class,
13 including whether or not there was really any receipt and how
14 one would measure an appropriate damage calculation for the
15 individual members, even if there is joint liability. I also do
16 not dismiss the possibility that a substantially larger recovery
17 by the plaintiff's class could result in defendant seeking
18 relief in bankruptcy and find that those risks are sufficient to
19 justify the proposed settlement of \$8.5 million.

20 I note that the defendant had, in particular, raised some
21 legitimate concerns with respect to prior consent being obtained
22 from a number of those people who received text messages via
23 autodialer, and that would have substantially complicated the
24 typicality requirement of Rule 23, which further complicated
25 this case. Ultimately, therefore, I have no substantial

1 difficulty finding the \$8.5 million settlement to be reasonable.

2 I will address the objections raised first as to the three
3 class members other than Ms. Stradtmann. They actually assert,
4 I suppose one could say refreshingly, that the lawsuit itself
5 was frivolous, arguing that the entire lawsuit was a waste of
6 the Court's resources, wholly unwarranted, and that any alleged
7 suffering they found to be I think one essentially said
8 laughable or, I guess more accurately, practically made him
9 laugh out loud.

10 I think given the changes in technology and the ability to
11 deliver text messages without involving autodialing does raise a
12 legitimate question as to whether these lawsuits are becoming or
13 should be treated as somewhat arcane, but the law is the law,
14 and I find no particular merit in these objectors. Whatever
15 legitimate question they may have raised with respect to the
16 efficacy of restrictions on telephone use for purposes of
17 texting, that is, nevertheless, the law. Caribou violated it,
18 and so I'm not sure what to do with these objections other than
19 to say the Court has noted them but finds no merit in them, at
20 least as concerns the current state of the law.

21 I do have a recovery as to -- I'm sorry. I do have a
22 question as to the right of recovery of these three members or
23 whether the Court should even consider simply relieving them of
24 the burden of receiving payment, but I'm not sure what authority
25 I have to do that under the case law. Can class counsel provide

1 me any guidance in that respect?

2 MR. HEDIN: Your Honor, none of those three class
3 members excluded themselves from the settlement, and so they --
4 and I believe that they did, in fact, file claims in order to
5 file these objections.

6 THE COURT: The objections. Yeah. That's the great
7 irony of their objection is that they are, nevertheless,
8 seeking -- effectively seeking it, although I'm not sure that's
9 really their intent.

10 MR. HEDIN: Your Honor, if I may, to the extent that --
11 they're going to receive a check in the mail. If they don't
12 cash that check, it will become an unclaimed fund -- it will go
13 to the unclaimed fund portion of the settlement, which will then
14 revert back to the remaining class members who did file claims,
15 and the process will continue until a check to a claiming member
16 would be under a dollar, in which case the relief -- the
17 remainder of the fund will go to a *cy pres* recipient approved by
18 Your Honor.

19 THE COURT: What I would direct is that you provide
20 specific notice to these three objectors that while the Court
21 noted and found some merit in their concern, there is no
22 question under the case law that -- or the statute and the case
23 law that, at least in the Court's view, the claims were
24 meritorious and that I did provide final approval of the class,
25 and then indicate what their option is if they do not wish to

1 actually receive the payments and what will happen to those
2 funds.

3 MR. HEDIN: Absolutely. We'll do that forthwith.

4 THE COURT: All right. Any concerns for the defendant
5 with respect to that approach?

6 MS. HOFFMAN: No. Thank you, Your Honor. That's fine.

7 THE COURT: Any for the other objector?

8 MR. OGORCHOCK: No.

9 THE COURT: All right. Let me move on then to the
10 objections raised by Susan Stradtmann, which obviously take a
11 very different tact arguing fairly comprehensively that the
12 settlement is insufficient, both in terms of the dollars that
13 are being provided, which she suggests should be differentially
14 awarded based on the number of text messages received by
15 individuals, which strikes the Court as incredibly cumbersome --
16 an objection that I have not seen undertaken in other similar
17 cases, and I find very little merit in them, although I will
18 hear briefly from counsel for Ms. Stradtmann in that regard --
19 and then an objection that the attorney's fees and the incentive
20 to reward are too great, which I will address in a moment, but I
21 didn't find anything particularly enlightening in the objection
22 with respect to either and were going to be issues for this
23 Court, as is consistent with my regular practice, whether or not
24 Ms. Stradtmann had ever filed an objection.

25 As to the numbers, there are some -- as to the settlement

1 amount and the -- the suggestion that settlement should consider
2 the number of texts that individual class members received,
3 there are some 530,000 class members receiving, I think as
4 Ms. Farnham puts it, only 50 text messages while Ms. Farnham
5 reports she received far more messages, indeed that she received
6 hundreds of such text messages.

7 I just can't imagine that this Court would upset this
8 entire settlement over a concern that there may be individual
9 differences in the number of calls that were received, and
10 Ms. Stradtmann is the sole objector on that basis. To me the
11 best measure of the injury, if you will, or disruption in one's
12 life that resulted from these text messages is not necessarily
13 the number of text messages but if the person cared. If you
14 were someone who really disliked receiving these kinds of text
15 messages, 50 may well have been incredibly upsetting. If you're
16 someone who really doesn't care about spam and knows how to
17 redirect spam, hundreds may not have been upsetting at all.

18 To me the best measure of whether or not this was upsetting
19 or injurious is whether or not the individual class member opted
20 into the class, and, indeed, that percentage who actually opted
21 into the class of 13.9 percent are almost certainly those who
22 were bothered by this as well as likely some who just see an
23 opportunity to receive payment, but I don't see a good way to
24 differentiate that nor any practical way for class counsel to --
25 much less defendant to have started to differentiate between

1 them. We would have eaten up any settlement through the expense
2 of that kind of individualization and, indeed, would have upset
3 the class -- or certification of the class altogether because of
4 the concern that Ms. Stradtmann would raise.

5 So I see no merit in that, but I said I would hear briefly
6 from you, Mr. Ogorchock, so I will.

7 MR. OGORCHOCK: Well, and given the Court's comments, I
8 don't know that anything I say would have any impact --

9 THE COURT: Give it your best shot.

10 MR. OGORCHOCK: But obviously if -- from my
11 perspective, people receive text messages, people receive emails
12 that are not wanted, you know, spam, as the Court mentioned. I
13 think there is a big difference between getting one text message
14 or one email versus having your phone flooded on a constant
15 basis, and I think --

16 THE COURT: Even if that were true, how would the class
17 counsel have possibly tried to attempt to differentiate among
18 the class members, and why wouldn't that have resulted in my
19 denying class certification as to damages to begin with?

20 MR. OGORCHOCK: I don't know but --

21 THE COURT: Well, that's a bad response for someone
22 who's purporting to represent an objector on this basis.

23 MR. OGORCHOCK: What I meant to say was, Your Honor,
24 what -- one of the options they could have done is on the claim
25 card, they could have -- you might have to rely on the honesty

1 of the class members --

2 THE COURT: It's wholly impractical to do that,
3 Counsel, and you know that, and why you think that's a basis for
4 objection of this class, I don't know and I have yet to hear.
5 It's not practical. It wasn't practical, and it's no basis for
6 an objection. Is there anything else you want to -- something
7 else that I'm missing in the nuance of this argument?

8 MR. OGORCHOCK: No.

9 THE COURT: All right. I don't know that there's
10 anything else in your objection other than the attorney's fees
11 and award to the representative for the class, but if I haven't
12 addressed it and you think there's something else, I will.

13 MR. OGORCHOCK: No, I think the Court has already
14 addressed the other objection as far as the amount. I think the
15 Court has already addressed that so --

16 THE COURT: All right. Very good. Then I will move on
17 to the suggestion by Ms. Stradtmann that the settlement deviates
18 from that of a typical TCPA recovery. There was cherry picking
19 that went on in the submission. I also find, you know, on
20 average the vast majority of the settlements in these cases have
21 been less than \$7 million, at least as the Northern District of
22 Illinois was able to document them in *Capital One*. I've already
23 addressed why I think the settlement is appropriate here.

24 As to the complexity and length and expense of the
25 litigation, although, as I say, I think liability was fairly

1 straightforward, I have already addressed the difficulties
2 presented by individual class member claims as well as the
3 possibility of bankruptcy. I do think that counsel for the
4 class appears to have moved expeditiously and with some
5 efficiency to arrive at a fair and reasonable settlement. I
6 also find counsel certainly competent to play the role that they
7 did in this case and their overall work to have been quite good
8 and effective.

9 After preliminary approval, there was substantial motion
10 practice. There was joint discovery, and discovery was wide
11 ranging, as represented by the class -- by class counsel, which
12 lasted for some five months. In fact, the parties ultimately
13 reached this settlement only following what has been described
14 as ten hours of contentious, arm's-length negotiation at
15 mediation with former Magistrate Judge Morton Denlow, and I have
16 no reason to doubt that it was exactly that, and under all these
17 circumstances, I, therefore, find the settlement to be fair,
18 reasonable, and adequate.

19 As I said, then there is the question of attorney's fees
20 and the incentive award for the class representative,
21 Mr. Farnham -- or, I'm sorry, Ms. Farnham. The proposal is
22 \$10,000. I do find that as the sole representative, regardless
23 of some variation in what these awards are, that Ms. Farnham had
24 to play an important role, not only agreeing to sue on behalf of
25 the class but ultimately retaining counsel, participating in

1 discovery, and providing information to class counsel. She
2 submitted a declaration supporting the supplemental brief that
3 opposed Caribou Coffee's motion to stay. She also remained
4 generally informed about the case and reviewed and executed the
5 settlement agreement ultimately obtaining substantial relief for
6 the class. While we could have some argument about whether a
7 \$5,000 award, which has been made by other courts, versus a
8 10,000 award is more appropriate, I -- at the end of the day I
9 think a \$10,000 incentive fee is perfectly reasonable, and I
10 will approve it.

11 The question as to the attorney's fees is always a more
12 difficult one, particularly when you have a settlement of the
13 size here. Class counsel asks for roughly \$2.7 million in fees
14 inclusive of its own out-of-pocket expenses and argues that the
15 Court should defer to contingency fee arrangements that
16 typically provide for 30 to 40 percent of the recovery plus
17 expenses.

18 If class counsel wished to proceed on a contingency fee
19 basis, they could have sought approval of this Court at the
20 outset as the Seventh Circuit contemplates. They did not, and
21 so I don't find much guidance in the contingency fee
22 arrangements nor in plaintiff's retainer agreement in terms of
23 arriving at an appropriate fee award. Counsel did provide a
24 summary of their hours and fees that would provide for a
25 lodestar cross-check. The base lodestar here would be \$520,833,

1 which would mean that the requested fee would be 4.86 times the
2 base lodestar and expenses or 5.2 times the base lodestar
3 itself.

4 I am not inclined to look purely at a lodestar any more
5 than I am to the contingency given the uncertainties that the
6 Court has already noted in these cases. Stradtman in her
7 objections cites market rates for TCPA attorney's fees at most
8 of 20 percent, which is simply not accurate and is, again,
9 another example of how unhelpful the objections were that she
10 raised, but I've already mentioned the *Capital One* decision,
11 which does a fairly good job of summarizing TCPA class
12 settlements beginning at those of less than \$345,000, which
13 resulted in a median fee of 31.2 percent, and ranging up to 15.9
14 million to \$39.9 million, which resulted in a mean fee of 17.2
15 percent.

16 The fees in the range that the Court is considering here,
17 which I'll put in 4.6 million to 9.8 million, show relative
18 fees -- contingency fees of 24.1 percent up to \$7 million and
19 25.8 percent up to \$9.8 million, but the median fee in both was
20 25 percent, and I think that's probably a reasonable starting
21 point to consider an appropriate market fee award here.

22 There is an argument that counsel asks for a 6 percent
23 premium based on risk. As I've already addressed, I think there
24 were some significant risks here given the potential for a
25 substantial defense to the claims based on the defendant,

1 Caribou Coffee, having received permission to send some of these
2 texts to some of the class members as well as the risk of
3 bankruptcy. On the other hand, this is now long-standing case
4 law, and I don't see a 6 percent premium being a fair reflection
5 of the additional risk of this particular class action.

6 I admit that there's never an exact science to arriving at
7 an award, but in considering all factors, I am of a mind to
8 award 30 percent after total costs of -- or the additional costs
9 of administration are removed from the settlement because those
10 were not anticipated in the Court's preapproval, and it seems to
11 me that that accommodates and provides some substantial premium
12 over the 25 percent but is fairer to the class members given the
13 size of the award here.

14 So I have not done the math, and I will permit plaintiff's
15 counsel to address both my proposed award as well as the best
16 manner to arrive at the final award, but it is intended to be
17 30 percent of the total settlement minus the costs of
18 administration and notice above \$343,052.48.

19 Any questions or comments for class counsel?

20 MR. HEDIN: Thank you, Your Honor. Just in terms of
21 the breakdown in arriving at the number, Your Honor is correct
22 that obviously the 657,000 should be reduced from the total fund
23 prior to factoring any attorney's fees based upon the percentage
24 that the Court decides upon. I will note that after the 657,000
25 are deducted, plaintiff's requested fee of one-third would

1 equate to roughly a 4.6 multiplier as opposed to the 5
2 multiplier that was originally mentioned in the papers.

3 In terms of --

4 THE COURT: And I think I noted it was 4.6 when I was
5 discussing that.

6 MR. HEDIN: Okay.

7 THE COURT: 5.2 if we didn't reduce by the costs.

8 MR. HEDIN: Certainly. The *In re Capital One* court did
9 a survey of TCPA settlements in district courts of the Seventh
10 Circuit and elsewhere and arrived at the conclusion that the
11 first 10 percent of the total fund -- or, I'm sorry, the first
12 \$10 million of any TCPA fund should be used to allocate fees of
13 30 percent of that first 10 million and then a decreasing
14 sliding scale as the bands --

15 THE COURT: I'm familiar with how they arrived at their
16 number.

17 MR. HEDIN: Several of the cases involving the lower
18 settlements that were relied upon by the *Capital One* framework
19 were settlements where court-approved fees were based upon the
20 entire settlement fund as opposed to the net settlement fund
21 after the administration costs are deducted because many of
22 those cases were prior to --

23 THE COURT: I agree it's difficult to rely upon those
24 exact calculations.

25 MR. HEDIN: The one case I would -- two cases I would

1 point the Court to in figuring fees in this particular case for
2 an \$8.5 million settlement, in *Kolinek v. Walgreens* the Northern
3 District of Illinois considered an \$11 million TCPA settlement
4 in a text message case and actually awarded the full 36 percent,
5 the 30 percent base plus the 6 percent risk premium articulated
6 *In re Capital One*, in determining the appropriate fee award
7 based on the first \$10 million band. Similarly, in another case
8 that class counsel recently discovered --

9 THE COURT: What was the date of that case?

10 MR. HEDIN: I believe *Kolinek v. Walgreens* is a 2015
11 case. I don't have the specific cite handy, but it is cited in
12 our papers. The most helpful case though is probably *Grant v.*
13 *Commonwealth Edison Company*. This is an unpublished case. It's
14 not on WestLaw, and it's not reported. This is another Northern
15 District of Illinois TCPA settlement of 4.95 million. This is a
16 2013 case, but settlement was approved in 2015, and the case
17 number is 13-CV-8310, and ECF numbers 58 and 68 provide the
18 information that I just mentioned about the request and the
19 Court's approval of the request. The Court approved 36 percent
20 of the 4.95 million again under the *In re Capital One* framework.

21 The other thing I'd like to point out is that our request
22 does not include additional out-of-pocket expenses to be
23 reimbursed to class counsel. We've requested 33.3 percent --

24 THE COURT: I understand that, Counsel. I understand
25 that.

1 MR. HEDIN: So taking into account the *In re Capital*
2 One framework and just the general Seventh Circuit guidance that
3 the Court should look to an *ex ante* negotiation between counsel
4 and the client at the outset, a hypothetical negotiation --

5 THE COURT: And the Seventh Circuit has also made clear
6 if you want to rely upon that, it's a single individual member
7 of the class, you should seek preapproval by the Court, and we
8 might be having a different discussion today had you done that,
9 but you didn't.

10 MR. HEDIN: I agree that the Seventh Circuit has
11 instructed counsel that they have the option of doing that, but
12 I don't know that the failure to do so --

13 THE COURT: I'm not saying it's not relevant. I'm not
14 ignoring that that was the contingency arrangement that you
15 entered into. I'm just saying I don't find it particularly
16 persuasive in these cases given the history of liability that
17 has been -- has already been established.

18 MR. HEDIN: Understood, Your Honor. So for those
19 reasons we believe that 33.3 percent is a fair and reasonable
20 amount in light of the *In re Capital One* decision and its
21 progeny, and that's essentially what we have to offer on that
22 point. Thank you, Your Honor.

23 THE COURT: Understood. Thank you. Did defendant want
24 to be heard as to the fees?

25 MS. HOFFMAN: No, Your Honor. Caribou did not take a

1 position on the plaintiff's class counsel's request for fees.
2 The one suggestion that I might have is before the Court enters
3 a final decision, perhaps we could speak with the claims
4 administrator to get a not-to-exceed final number for claims
5 administration just so that we could have a final number for the
6 Court to work from.

7 THE COURT: All right. Mr. Ogorchock, I'll hear
8 briefly if you have anything else you want to add.

9 MR. OGORCHOCK: Your Honor, I think the Court has
10 summarized things, so I don't think there's anything we need to
11 add at this point.

12 THE COURT: All right. I will take under advisement
13 the request for some additional amount. I do want to look at
14 the *Kolinek* and *Grant* decisions because I had not reviewed them
15 in advance of this hearing, so I will, as part of my final
16 approval, give you a final decision on the fee award, but I
17 otherwise approve a settlement. I would encourage both sides to
18 work with the claims administrator to arrive at a final number.
19 And just to confirm the parties' agreement, it is that the total
20 cost of administration is to be taken from the \$8.5 million
21 settlement before any percentage is applied; is that correct?

22 MR. HEDIN: That's absolutely correct, Your Honor.

23 MS. HOFFMAN: Yes, Your Honor, that's correct.

24 THE COURT: All right. Is there anything else that the
25 plaintiff's class wants to add -- or I should say plaintiff's

1 counsel as well want to add before I close this hearing?

2 MR. HEDIN: No, Your Honor. Thank you very much.

3 THE COURT: Anything more for the defendant?

4 MS. HOFFMAN: No. Thank you, Your Honor.

5 THE COURT: Anything more for the objector,

6 Ms. Stradtmann?

7 MR. OGORCHOCK: No, Your Honor.

8 THE COURT: Thank you, all, for your time today, and
9 this matter is under advisement as to the last issue of class
10 fee. We are adjourned -- actually, we're in recess. Thank you.

11 THE CLERK: All rise.

12 (Proceedings concluded at 10:53 a.m.)

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1 I, JENNIFER L. DOBBRATZ, Certified Realtime and Merit
2 Reporter in and for the State of Wisconsin, certify that the
3 foregoing is a true and accurate record of the proceedings held
4 on the 27th day of November, 2017, before the Honorable William
5 M. Conley, U.S. District Judge for the Western District of
6 Wisconsin, in my presence and reduced to writing in accordance
7 with my stenographic notes made at said time and place.

8 Dated this 30th day of November, 2017.

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14 /s/ Jennifer L. Dobbratz

15 Jennifer L. Dobbratz, RMR, CRR, CRC
16 Federal Court Reporter
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